

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION THIRTY-THREE**

TRANSPORTATION LEASING OF INDIANA, INC./
SOUTH END CARTAGE CORP.1/

Employer

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL 705, AFL-CIO1/

Petitioner

DECISION AND DIRECTION OF ELECTION

33-RC-4539

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,2/ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.3/

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:4/

All full-time and part-time spotters, shuttle drivers, shift leaders,5/ and yard checker employed by the Employer at its facility located at the Kmart distribution center at 333 South Spruce Street, Manteno, Illinois, but excluding the yard manager, professional employees, office clerical employees, guards and supervisors as defined by the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations.^{6/} Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by International Brotherhood of Teamsters, Local 705, AFL-CIO.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966); **N.L.R.B. v. Wyman-Gordon Company**, 394 U.S. 759 (1969).^{7/} Accordingly, it is hereby directed that within 7 days of the date of this Decision two copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the *33rd Subregion, Hamilton Square, 300 Hamilton Boulevard, Suite 200, Peoria, Illinois, 61602*, on or before October 30, 2000. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by November 6, 2000.

Dated October 23, 2000
at: Peoria, Illinois

/s/ Ralph Tremain
Ralph Tremain, RD – Region 14

1/ The Employer's and the Petitioner's names appear as amended at the hearing.

2/ I have carefully considered the record evidence, the parties' statements on the record, arguments on the record and the briefs filed by the parties.

3/ Transportation Leasing of Indiana, Inc., hereinafter referred to as TLI, is an Indiana corporation with an office located at 4222 South Knox Avenue, Chicago, Illinois. TLI is engaged in the operation of an employee leasing company and, during the past calendar year, a representative period, it directly performed services valued in excess of \$50,000 for customers located at points outside the State of Illinois.

South End Cartage Corp., hereinafter referred to as South End, is a Delaware corporation with an office located at 4222 South Knox Avenue, Chicago, Illinois. South End is a motor carrier which owns various trucking equipment and maintains operating licenses haul freight. It provides inter-modal carrier services and other trucking services, including spotting services. During the past calendar year, a representative period, the South End purchased and received goods and materials valued in excess of \$50,000 directly from vendors located at points located outside the State of Illinois. There are approximately fourteen employees employed within the unit found appropriate.

The parties are at issue regarding the relationship and status of TLI and South End. The Petitioner maintains that TLI and South End are a single employer, joint employers or alter egos in respect to the petitioned unit of employees. Contrary to the Petitioner, TLI and South End contend that each is a separate legal entity and that there is insufficient evidence to establish any of the special relationship as urged by the Petitioner. Instead, they argue that TLI is the sole Employer of the petitioned employees.

South End has entered into a contractual relationship with Kmart Corporation under which South End provides trailer spotting services to Kmart at Kmart's distribution center located at 333 South Spruce Street in Manteno, Illinois. Urso testified that South End's "spotting" contract has expired and is now on a month-to-month extension pending negotiations between South End and Kmart. South End's equipment is utilized at Kmart facility and it maintains a trailer as its office at that

location. South End leases all the individuals utilized in that operation from TLI, including the facility manager, Mark Baker.

TLI and South End share office space at 4222 South Knox Avenue in Chicago. Richard Urso, is the president and primary owner of South Side and he maintains his office at the Knox Avenue location. According to Urso, South Side operates without employees. Urso negotiates contracts, pays bills and takes care of general business for South End. When he requires clerical assistance for his South End business, he utilizes one of TLI's secretaries at the Knox Avenue facility for which TLI is reimbursed by South End.

Urso also owns TLI and serves both as its president and secretary. Baker, TLI's Kmart facility manager, reports directly to Urso. In regards to the Kmart facility, Urso testified that if South End had a problem with one of the TLI employees:

"I would call Mark Baker or I may take it upon myself to terminate him."

When questioned about how TLI's Kmart facility employees' wage rates were determined, Urso testified that he fixes the rates. In determining the TLI wage rates, he stated that "we'd have to plug in the number that we're (South Side) getting from Kmart, take my investment that I have, and try and come out with a profit..."

A single-employer relationship exists when two or more entities are in reality part of a single integrated enterprise. The Board has long utilized four criteria in determining whether a single-employer relationship exists: (1) common ownership (2) common management (3) functional interrelation of operations and (4) centralized control of labor relations. See Broadcast Employees NABET Local 1264 v. Broadcast Service of Mobile, 380 U.S. 255 (1965); American Stores Packing Co., 277 NLRB 1656 (1986). Not all of these criteria need to be present to establish single employer status. Denart Coal, 315 NLRB 850, 8651 (1994), *enfd.* 71 F3d 486 (4th Cir. 1995). Single Employer status depends on "all the circumstances of case" and is characterized by the absence of the "arms length relationship found among unintegrated companies." Blumenfeld Theatres Circuit, 240 NLRB 206, 215 (1979), *enfd.* 626 F.2d 865 (9th Cir. 1980). The fundamental enquiry is whether there exists overall control of critical matters at the policy level. Emsing's Supermarket, 284 NLRB 302 (1987).

After examining these criteria and considerations in light of the structure and relationship of these two entities, I find that South End and TLI constitute a single employer of the employees in the unit found appropriate herein. All four criteria are present. Common ownership and common management are present through Richard Urso's complete ownership of the two entities and his total control of the management of both companies. As to the functional interrelation of operations, this criteria is satisfied at the most basic level: South End procures the customer (Kmart), maintains the relationship and provides the necessary equipment while TLI provides the employees to fulfill South End's contractual obligations. See Centurian Auto Transport, 329 NLRB No. 42, p. 3 (1999). All of these functions are directly controlled by Richard Urso. The last and perhaps most important criteria, the centralized control of labor relations, is also satisfied. While South Side does not have employees, Richard Urso clearly controls the labor relations policies that affect the Kmart facility employees and that control is dedicated to the interests of South Side.

Contrary to the Employer, South Side's lack of employees or managers under Urso does not prevent it from having common management and common labor relations policies with TLI. I also note the lack of an arms length relationship between South End and TLI which was highlighted by the fact that Urso could not locate a copy of the contract setting out the terms of the relationship between the two companies. It is telling that such a document would have been authorized by Urso on behalf of both companies. In sum, I find that a single-employer relationship exists between South End and TLI as to the employees within the unit found appropriate herein. In light of this finding, I find no need to address whether the two companies are joint-employers or alter egos.

4/ As indicated above, the parties were in accord in regards to the scope of the unit-confining it to the Employer's Kmart operation. The parties also were in agreement that Dawn Palmer, the yard checker, should be included in the unit found appropriate and I so find. The parties stipulated that Mark Baker, yard manager, hired and fired employees and is a supervisor within the meaning of the Act. I so find and exclude him from unit found appropriate.

5/ The sole issue as to the composition of the instant unit involves the supervisory status of three shift leaders, Russ Jones, Keith Bonds and Will Kilpatrick. The Employer maintains that the shift leaders, also called shift supervisors and lead spotters, are supervisors within the meaning of

Section 2(11) of the Act. Contrary to the Employer, the Petitioner contends that the three are employees and that they should be included in the unit found appropriate herein.

BACKGROUND

As described above, the Employer provides spotting services to Kmart at its distribution facility in Manteno, Illinois. Mark Baker, yard manager, is in charge of the Employer's Kmart operation. Baker reports directly to Owner/President Richard Urso. The Employer's Kmart operation is a six day, twenty-four hour operation. The workday is divided into three eight-hour shifts—6:00 a.m. to 2:00 p.m., 2:00 p.m. to 10:00 a.m., and 10:00 p.m. to 6:00 a.m. Each shift has a shift leader. Will Kilpatrick is the first shift leader. Keith Bonds is the second shift leader. The third shift leader is Russell Jones. Including the shift leaders, there are five spotters on the first shift, five spotters on the second shift and three on the third shift. Dawn Palmer, the yard checker, works the first shift. It appears that her work in keeping track of trailers for Kmart is independent and distinct from the spotting work and that she directly reports to Baker.

The Employer's Operations At Kmart

Kmart's Manteno facility is a very large warehouse and distribution area that includes both receiving and shipping docks. These docks are approximately one-half mile apart. In addition to its extensive yard area where trailers are parked, Kmart also leases an off-site yard where trailers are stored. Third party carriers bring trailers loaded with goods to be warehoused and haul goods out of the facility and transport them to Kmart's retail stores. The trailers are unhooked and parked in the yard. The Employer's spotters move the loaded trailers to the facility's receiving dock where Kmart employees unload and warehouse the goods delivered. The spotters bring empty trailers to the shipping docks where they are loaded by Kmart employees. Also, spotters take the loaded trailers and stage them for later pick up by third party carriers. Because of the large number of trailers at the Manteno, the trailers are constantly being shuttled back and forth from the off-site yards. This work is also done by the Employer's spotters. Spotters utilize a special tractor for spotting work which features a fifth hydraulic wheel.

The Shift Leaders

The three shift leaders are hourly-paid and punch a time clock as the spotters do. They are paid fourteen dollars an hour which is one dollar to one-dollar-and fifty-cents an hour more than the spotters who generally start at twelve-dollars-and fifty-cents an hour. The shift leaders do not wear any distinctive clothing or badges. None of the Employer's Manteno employees wear uniforms. The shift leaders have the same vacation, benefits, work rules and general working conditions as the spotters. They are subject to the same overtime, health coverage and sick pay provisions as the spotters. The shift leaders perform spotting work eighty to ninety percent of their working time.

The primary non-spotting function of the shift leaders involves the coordination between Kmart and the Employer's spotters. Essentially, the shift leader on each shift obtains a "jockey" which is a list of trailer moves from Kmart personnel. The "jockey" acts as a work assignment sheet and it is utilized throughout the shift. Additionally, a Kmart dispatcher announces other trailer moves during the shift. Generally, such moves are accomplished by the nearest spotter to the announced trailer. Shift leaders can and do move spotters back and forth from the receiving and the shipping areas depending on the work flow. This is in accordance with the Employer's policy which requires spotters to perform their duties where the work is, not exclusively in the receiving or the shipping area. The shift leaders' job description states:

"There will be NO shipping spotters *only* or receiving spotters *only*. You will be required and responsible to place the proper amount of spotters in any capacity when volume dictates, this includes yourself."

The shift leader job description lists no specific supervisory duties but it does set out:

"You will be required to solve problems. Sometimes a situation calls for an immediate response and you need to be competent enough to make a decision on your own and also be held accountable."

The shift leaders have a limited role in the Employer's disciplinary system which is not set out or defined in their job description. The shift leaders can "write up" an employee and send him home if he is obviously intoxicated and witnessed as such by other spotters in circumstances where yard manager Baker is not present. However, in other situations, even where the facts are not in dispute,

Baker must approve and sign off on write-ups. When the facts are conflicting or there are other disputed matters between the shift leader and the spotter(s), Baker makes an independent investigation and makes his own decision in the matter. It also appears that Baker prepares write-ups himself, although a write-up might be delivered by the shift leader to the affected employee on his shift.

Shift leaders call in employees to work overtime. The Employer has generated a very specific written overtime policy which designates the spotter who is responsible for working overtime on each day for every shift. The designated spotter is further responsible for finding a replacement in a situation where he cannot perform his overtime. In the uncommon situation where overtime is not covered in this way, it appears that the shift leader would find coverage by calling from the spotter list.

The shift leaders, with the possible exception of first shift leader, Will Kilpatrick, do not interview applicants. It appears that Kilpatrick talks to applicants and makes notes for Baker when Baker is absent or too busy to see an unscheduled job applicant who comes to the facility on the first shift. Baker interviews all applicants hired and makes all decisions on hiring. All the shift leaders give applicants “road tests” of applicants’ ability to perform spotting work and pass their opinions on to Baker.

DISCUSSION AND DETERMINATION

Supervisory status under the Act depends on whether an individual possesses authority to act in the interest of the employer in the matters and in the manner specified in Section 2(11) of the Act, which defines the term “supervisor” as:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet this definition, a person needs to possess only one of the specific criteria listed, or the authority to effectively so recommend, as long as the performance of that function is not routine but requires the use of independent judgment. See Ohio Power Co. v. NLRB, 176 F.2d 385 (6th Cir. 1949), cert. Denied 338 U.S. 899 (1949). See also Queen Mary, 317 NLRB 1303 (1995).

Applying Section 2(11) to the duties and responsibilities of any given person requires that the Board determine whether the person in question has authority to use independent judgment in performing any of the functions listed in Section 2(11), and to do so in the interest of management. Hydro Conduit Corp., 254 NLRB 433, 437 (1981). As pointed out in Westinghouse Electric Corp. v. NLRB, 424 F.2d 1151, 1158 (7th Cir. 1970), cited in Hydro Conduit Corp.: “the Board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect.”

In enacting Section 2(11), Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, setup men and other minor supervisory employees.” See Senate Rep. No. 105, 80th Cong., 1st Sess. 4 (1947). The Board has long recognized “there are highly skilled employees whose primary function is physical participation in the production or operating processes of their employer’s plants and who incidentally direct the movements and operations of less skilled subordinate employees,” who nevertheless are not supervisors within the meaning of the Act since their authority is based on their working skills and experience. Southern Bleachery & Print Works, Inc., 115 NLRB 787, 791 (1956), enf’d 257 F.2d 235 (4th Cir. 1958), cert. denied, 359 U.S. 911; Gulf Bottlers, Inc., 127 NLRB 850, n. 3, 858-861 (1960), enfd. sub nom, United Brewery Workers v. NLRB, 298 F.2d 297 (D.C. Cir. 1961).

Finally, in addition, the party seeking to exclude an individual from voting for a collective bargaining representative has the burden of establishing that the individual is ineligible to vote. Golden Fan Inn, 281 NLRB 226, 229-230 fn. 12 (1986). As stated in The Ohio Masonic Home, Inc., 295 NLRB 390, 393 (1989): “in representation proceedings such as this, the burden of proving that an individual is a supervisor rests on the party alleging that supervisory status exists.” Tucson Gas & Electric Co., 241 NLRB 181 (1979), Dickinson-Iron Agency, 283 NLRB 1029, 1034 (1987). Furthermore, “whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, (the Board) will find that supervisory status has not been established, at least on the basis of those indicia.” Phelps Community Medical Center, 295 NLRB 486, 490 (1989).

After reviewing the above indicia and considerations, I find the shift leaders not to be supervisors within the meaning of the Section 2(11) of the Act. In reaching that finding, I first note that the shift leaders do not hire, fire, transfer, suspend, lay off, recall, promote, reward, or discipline other employees. Nor do I find that the shift leaders effectively recommend such actions, including recommendations in regards to hiring or discipline. In respect to hiring, the fact that the shift leaders perform field testing of prospective hires does not amount to authority to recommend hire. See Hogan Mfg., 305 NLRB 806, 807 (1991); Plumbers Local 19 (Jefferson Chemical), 237 NLRB 1099, 1101-1102 (1978). Here, like in Hogan and Jefferson Chemical, the Employer's deference to the field testing has to do with the shift leaders' experience and expertise, not to any delegation of authority to participate in the hiring process. I also do not find shift leader Kilpatrick's occasional discussions with applicants and his resulting notes to Baker regarding the applicants to be effective recommendations in regards to hiring. Such interviews only take place when Baker is absent or otherwise unavailable and Baker does his own interview before any applicant is hired. See U.S. Pollution Control, Inc., 278 NLRB 274 (1986).

In regards to discipline, contrary to the Employer, I do not find that the shift leaders discipline or effectively recommend such by sending employees home for being intoxicated or in similarly obvious situations. Such action does not require discretion or independent judgment as contemplated by Section 2(11) of the Act. The written disciplinary warnings or write-ups signed by shift leaders also do not evidence supervisory authority on their part. Even in the cases where such action is initiated by shift leaders, the write-ups are prepared and signed by Baker before the shift leaders get them. Baker investigates all conflicted matters independently and makes his own decision in all such cases. The authority effectively to recommend means generally that the recommended action is taken with no independent investigation by superiors, not simply that the recommendation is ultimately followed. ITT Lighting Fixtures, 265 NLRB 1480, 1481 (1982), reversed on other grounds, 283 NLRB 453 (1987). Moreover, the record clearly shows that Baker has not regularly followed the shift leaders recommendations in such matters. Under such circumstances, communications by shift leaders to Baker regarding spotter employees' conduct or performance amounts only to a reporting function

and does not establish supervisory status. Express Messenger Systems, 301 NLRB 651, 653-654 (1991). See also Aircraft Displays, Inc., 262 NLRB 1233, 1234-1235 (1982).

The Employer also contends that the shift leaders exercise independent judgment in the assigning and directing the work of the spotters. I disagree. There is no evidence presented by the Employer that indicates that the assessment of the skill of the spotters is made in regard to the assignment of the spotting work which appears to be similar both in the shipping and receiving areas. Indeed, the assignments by the shift leaders appear to be nothing more than the shifting of spotters to different geographic areas in the yard in an effort to equalize the work. The Board has consistently found that assignments made to equalize employees' work load are routine and do not require the exercise of independent judgment. Byers Engineering Corp., 324 NLRB 740, 741 (1997). Similarly, the assigning of overtime under the Employer's mandatory system and the "granting" of a day off to an employee subject to yard manager's review does not involve independent judgment by the shift leaders as contemplated by Section 2(11).

I have also considered the Employer's contention that the lack of supervision when Baker is not on duty as indicative of supervisory status of the shift leaders. The cases cited in support of this contention by the Employer are inapposite. Contrary to the cited cases, the work involved in the instant case is highly routine, involves very small employee complements and the work takes place on facilities not owned or secured by the Employer. Finally, I note that if the shift leaders were deemed supervisory, there would be four supervisors for ten spotters which would be an unrealistic ratio in view of the Employer's operation.

For all these reasons, I find the shift leaders, Russ Jones, Keith Bonds and Will Kilpatrick not to be supervisors under Section 2(11) of the Act. Their responsibilities are those of leadpersons and they do not exercise the requisite independent judgment in the performance of their duties to be deemed as supervisors. Accordingly, I include them in the unit found appropriate herein.

6/ Your attention is directed to Part 103, Subpart B, Section 103.20 of the Board's Rules and Regulations, Series 8, as amended, which provides, inter alia, that employers shall post copies of the Board's official Notice of Election in conspicuous places at least three full working days prior to 12:01 a.m. of the day of the election, that failure to do so shall be grounds for setting aside the election

whenever proper and timely objections are filed, and that an employer shall be estopped from objecting to nonposting or late posting of Notices unless it notifies the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received the Notices. You may wish to review the above rule in its entirety so that you are fully aware of its complete contents and the obligations imposed by it.

7/ The full first and last names and addresses of all eligible voters must be filed by the employer. North Macon Health Care Facility, 315 NLRB 359 (1994).

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